Chung Onn v Wee Tian Peng

HIGH COURT (TEMERLOH) — ORIGINATING MOTION NO 25-6-1992
LOW HOP BING J
23 MAY 1996

Civil Procedure *— Contempt of court — Sentence — Whether custodial sentence appropriate — Mitigating factors to be considered — Whether punishment is to vindicate dignity of court*

On 18 April 1996, the court found the respondent guilty of contempt in aiding and abetting one Chan Ah Kaw in presenting the transfer of one property. The matter now before the court was the sentence to be meted out in respect of the said contempt. The issue was whether there were any mitigating factors to be considered in imposing a proper sentence.

Held, imposing a fine:

(1) The respondent tendered an unqualified apology and pleaded for leniency. This is one of the mitigating factors which the court may take into consideration in imposing a proper sentence (see p 524E–F); *A-G v Arthur Lee Meng Kuang* [1987] 1 MLJ 206 followed.

(2) Other extenuating factors that the court considered in imposing a proper sentence were the fact that there did not appear to be any flagrant challenge to the court's authority; that the respondent had done everything in his power to purge the contempt and revert to status quo; and that the respondent was not in a continuing state of contempt (see p 524H–525A).

(3) Although the courts have plenary powers to impose a custodial sentence by way of imprisonment as a major sanction in a case of civil contempt, a custodial sentence is to be imposed only in the most serious cases. The seriousness will be judged by reference to the unrelenting interference with the due administration of justice and the unmitigated culpability of the offender, with the latter being the key factor (see p 525G–H); *R v Thomson Newspapers Ltd & Ors* [1968] 1 All ER 268 followed.

(4) The offfence of contempt of court is an interference with the administration of justice and the punishment to be meted out is not for the purpose of vindicating the dignity of the court, but to prevent the improper interference. The law of contempt of court is intended to ensure the effective administration of the law *(see* p 527H–528A); *A-G v Times Newspapers Ltd* [1974] AC 273, *Johnson v Grant* [1932] SC 789 and *A-G v Leveller Magazine Ltd & Ors* [1979] AC 440 followed.

(5) Under art 126 of the Federal Constitution and s 13 of the Courts of Judicature Act 1964, there is no statutory limit to the imposition of a fine. The culpability of the respondent in this case clearly called for the imposition of a fine, instead of a custodial sentence. In arriving at a proper fine, the factors considered were the participation of the respondent in relation to his interference with the due administration of justice; his standing as an advocate and solicitor; and the consequences of violating or disobeying the said order. Damage to public interest and the seriousness of the contempt must also be considered. Adopting current judicial thinking, a fair and reasonable sentence would be a fine of RM7,000 or two months' imprisonment in default of payment (see p 526A–E); *Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd* [1964] Ch 195, *Re Agreement of the Mileage Conference Group of the Tyre Manufacturers' Conference Ltd* [1966] 2 All ER 849 and *Wee Choo Keong v MBf Holdings Bhd* [1995] 3 MLJ 549 followed.

[Bahasa Malaysia summary

Pada 18 April 1996, mahkamah telah memutuskan bahawa penentang telah melakukan penghinaan mahkamah dengan membantu dan bersubahat dengan seorang Chan Ah Kaw dalam mengemukakan pemindahan sebuah hartanah. Perkara sekarang di hadapan mahkamah adalah hukuman yang patut dikenakan. Isunya adalah sama ada terdapat faktor-faktor peringanan untuk dipertimbangkan dalam mengenakan hukuman yang sewajarnya.

Diputuskan, mengenakan hukuman denda:

(1) Penentang telah mengemukakan permintaan maaf yang tidak bersyarat dan telah memohon peringanan hukuman. Ini adalah suatu faktor peringanan yang boleh dipertimbangkan oleh mahkamah dalam mengenakan hukuman yang sewajarnya (lihat ms 524E–F); *A-G v Arthur Lee Meng Kuang* [1987] 1 MLJ 206 diikut.

(2) Faktor-faktor peringanan yang lain yang telah dipertimbangkan oleh mahkamah dalam mengenakan hukuman yang sewajarnya adalah hakikat bahawa tidak terdapatnya cabaran ketara terhadap kuasa mahkamah; bahawa penentang telah melakukan semua yang boleh dalam kuasanya untuk menyingkirkan penghinaan tersebut dan kembali ke status quo; dan bahawa penentang telah tidak berada dalam keadaan penghinaan mahkamah yang berterusan (lihat ms 524H–525A).

(3) Walaupun mahkamah mempunyai kuasa penuh untuk mengenakan hukuman tahanan secara pemenjaraan sebagai hukuman berat dalam kes penghinaan sivil, hukuman tahanan harus dikenakan dalam kes-kes yang serius sahaja. Keseriusan akan diputuskan berdasarkan gangguan yang tidak terhenti-henti dengan pentadbiran keadilan dan kebersalahan melampau oleh

pesalah, dengan faktor kedua sebagai faktor utama (lihat ms 525G–H); *R v Thomson Newspapers Ltd & Ors* [1968] 1 All ER 268 diikut.

(4) Kesalahan peghinaan mahkamah adalah gangguan pentadbiran keadilan dan hukuman yang patut dikenakan bukanlah untuk tujuan menebus maruah mahkamah, sebaliknya ianya adalah untuk mencegah gangguan yang tidak sewajarnya. Undang-undang penghinaan mahkamah adalah bertujuan memastikan pentadbiran undang-undang yang berkesan (lihat ms 527H–528A); *A-G v Times Newspapers Ltd* [1974] AC 273, *Johnson v Grant* [1932] SC 789 dan *A-G v Leveller Magazine Ltd & Ors* [1979] AC 440 diikut.

(5) Di bawah perkara 126 Perlembagaan Persekutuan dan s 13 Akta Mahkamah Kehakiman 1964, tidak ada batasan statutori untuk pengenaan denda. Kebersalahan penentang jelasnya memerlukan pengenaan denda, dan bukan hukuman tahanan. Dalam mengenakan denda yang sewajarnya, faktor-faktor yang harus dipertimbangkan adalah penglibatan penentang berkenaan dengan gangguan pentadbiran keadilan; kedudukannya sebagai peguambela dan peguamcara; dan akibat pelanggaran dan keingkaran perintah tersebut. Akibatnya atas kepentingan awam dan keseriusan penghinaan tersebut juga harus dipertimbangkan. Memakai pemikiran kehakiman semasa, satu hukuman yang adil dan munasabah adalah denda RM7,000 atau pemenjaraan dua bulan jika ingkar bayaran (lihat ms 526A–E); *Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd* [1964] Ch 195, *Re Agreement of the Mileage Conference Group of the Tyre Manufacturers' Conference Ltd* [1966] 2 All ER 849 dan *Wee Choo Keong v MBf Holdings Bhd* [1995] 3 MLJ 549 diikut.]

Notes

For a case on sentencing in contempt of court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 836.

Cases referred to

A-G v Arthur Lee Meng Kuang [1987] 1 MLJ 206
A-G v Leveller Magazine Ltd & Ors [1979] AC 440
A-G, Malaysia v Manjeet Singh Dhillion [1991] 1 MLJ 167
A-G v Pang Cheng Lian & Ors [1975] 1 MLJ 69
A-G v Times Newspapers Ltd [1974] AC 273
Agreement of the Mileage Conference Group of the Tyre Manufacturers'Conference Ltd [1966] 2 All ER 849
Cheah Cheng Hoc v PP [1986] 1 MLJ 299
Johnson v Grant [1932] SC 789
Lakshminarayanan v Marimuthu [1993] 1 MLJ 277
MY Shareef v Hon Judges of the Nagpur High Court AIR 1955 SC 19
Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd [1964] Ch 195
R v Thomson Newspapers Ltd & Ors [1968] 1 All ER 268

Ramnikal v Pramlal AIR 1952 Kutch 74
Wee Choo Keong v MBf Holdings Bhd & Anor [1995] 3 MLJ 549

Legislation referred to

Courts of Judicature Act 1964 s 13
Federal Constitution art 126

T Jayadeva (*Syarikat Radhakrishnan*) for the applicant.
T Ramdass (*Siva Ram & Associates*) for the respondent.

Cur Adv Vult

Low Hop Bing J:

BACKGROUND

On 18 April 1996, this court found the respondent guilty of contempt in aiding and abetting one Chan Ah Kaw in presenting the transfer of the subject property. The matter now before me is in relation to the sentence to be meted out in respect of the said contempt.

MITIGATING FACTORS
Apology

The respondent through his affidavit tendered an unqualified apology to this court and pleaded for leniency. This is one of the mitigating factors which the court may take into consideration in imposing a proper sentence. This is the approach adopted by the then Supreme Court in *A-G v Arthur Lee Meng Kuang* [1987] 1 MLJ 206, where it was observed as follows at p 210:

> ... We wished that the advocate had tendered his apology before the hearing of this application and that he would plead for leniency after he is found guilty, to enable us to consider them as additional mitigating factors.

In India, the same judicial approach was adopted in which an apology was also given due consideration (see *Ramnikal v Pramlal* AIR 1952 Kutch 74 and *MY Shareef v Hon Judges of the Nagpur High Court* AIR 1955 SC 19).

Other extenuating circumstances

In arriving at a proper sentence, I also take into consideration the submission advanced on behalf of the respondent in respect of the following mitigating circumstances:

(1) There does not appear to be any flagrant open challenge to the court's authority and the conduct of the respondent was not contumacious or openly defiant;

(2) The respondent has done everything in his power to purge the contempt and revert to status quo in that he has procured a stamped, valid and registrable memorandum of transfer for the re-transfer of the subject property from Kek Pong Kuan to Chan Ah Kaw. The

respondent is ready, willing and able to present the memorandum of transfer at the relevant office at any time except that the applicant refuses to remove his private caveat to enable the re-transfer to be registered in compliance with the order of court dated 27 December 1990. In the circumstances therefore the respondent is not in a continuing state of contempt;

(3) Apart from the motion for contempt filed by the applicant, the applicant had also filed a complaint against the respondent pursuant to the Legal Profession Act 1976 for disciplinary proceedings to be taken against the respondent. Subsequently, the investigating tribunal met and recommended to the disciplinary board that:

> ... no cause of sufficient gravity exists for a formal investigation but that Wee Tian Peng (the solicitor concerned) should be ordered to pay a penalty.

The disciplinary board confirmed the recommendation of the investigating tribunal and fined the respondent RM500 which the respondent paid; and

(4) The respondent is a district councillor for the Temerloh district and the incumbent chairman of the Bandar Baru branch of the Malaysian Chinese Association ('MCA'), having been elected on 31 March 1996. The respondent is also the incumbent vice chairman of the Temerloh division.

SENTENCE

Article 126 of the Federal Constitution and s 13 of the Courts of Judicature Act 1964 confer upon our Federal Court, Court of Appeal and High Courts, the jurisdiction to punish any contempt of itself. Our superior courts have theoretically unlimited jurisdiction to mete out any sentence for contempt of court. I have considered the following options and opined as to the suitability and propriety of the specific sentence to be meted out in the instant case.

Imprisonment

Although our courts have plenary powers to impose a custodial sentence by way of imprisonment as a major sanction in a case of civil contempt such as the instant case, I am of the considered view that a custodial sentence is to be imposed only in the most serious cases. The seriousness will be judged by reference to the unrelenting interference with administration of justice and the unmitigated culpability of the offender, with the latter perhaps being the key factor (see *R v Thomson Newspapers Ltd & Ors* [1968] 1 All ER 268 at p 270 and *The Law of Contempt* (3rd Ed, 1996) by Nigel Lowe and Brenda Surfin at p 527). I do not propose to impose a custodial sentence in the instant case as it is not one of the most serious cases of contempt of court.

Fine

Under art 126 of the Federal Constitution and s 13 of the Courts of Judicature Act 1964, there is no statutory limit to the imposition of a fine. The culpability of the respondent here clearly calls for the imposition of a fine, instead of a custodial sentence. In arriving at a proper fine, I have taken into consideration the participation of the respondent in relation to his interference with due administration of justice, his standing as an advocate and solicitor who knows perfectly well, the nature and content of the consent order with which he has to comply and the consequences of violating or disobeying the said order. The penal element in enforcing a court order was emphasized by Cross J in *Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd* [1964] Ch 195 at pp 198–199 (also approving the statement in 8 *Halsbury's Laws of England* (3rd Ed) 20) as follows:

> ... Where there has been wilful disobedience to an order of the court and a measure of contumacy on the part of the defendants, then civil contempt ... 'bears a twofold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and the state, a penal or disciplinary jurisdiction to be exercised by the court in the public interest.' Civil contempt bears much the same character as criminal contempt.

In assessing the appropriate fine, I must take into account the damage done to public interest, in addition to the seriousness of the contempt. See also Megaw P in *Re Agreement of the Mileage Conference Group of the Tyre Manufacturers' Conference Ltd* [1966] 2 All ER 849 at p 862.

Various fines have been imposed by our courts and the courts in Singapore in the following cases in respect of civil contempt:

(1) In *A-G v Pang Cheng Lian & Ors* [1975] 1 MLJ 69, the High Court of Singapore imposed a fine of RM1,500 against the first respondent, a part-time reporter and stringer of the Newsweek Magazine; RM1,000 against the second respondent as the circulation manager; and RM500 against the third respondent as the distributor of the said magazine wherein an article entitled 'Singapore Selective Justice' which contained various statements scandalizing the court was published.

(2) In *Cheah Cheng Hoc v PP* [1986] 1 MLJ 299, the Federal Court altered a three-day imprisonment term imposed by the High Court to a fine of RM1,000, as the custodial sentence was considered rather harsh for a counsel who had concealed a document so as to affect the credibility of a witness in a civil suit.

(3) In *A-G, Malaysia v Manjeet Singh Dhillon* [1991] 1 MLJ 167, in imposing a fine of RM5,000, Mohd Yusoff SCJ said at p 181:

> The respondent is found in contempt of court in his representative capacity as secretary of the Malaysian Bar in affirming an affidavit criticizing the Lord President.

A The contemptuous words used in the respondent's affidavit are repetitions of similar criticism of the Lord President made by the Malaysian Bar at its meeting and similar statements made elsewhere

The respondent's responsibility is, in our opinion, vicarious. Although this is not itself a defence in contempt proceedings against him, nevertheless it is a mitigating factor to be considered in his favour.

B For these reasons we do not consider a custodial sentence appropriate. A fine of RM5,000 in default three months' imprisonment would be sufficient in the circumstances. Each party to pay its own costs.

(4) In *A-G v Arthur Lee Meng Kuang* [1987] 1 MLJ 206, the Supreme C Court imposed a fine of RM5,000, as it was held that a custodial sentence was not necessary in this particular case. Mohamed Azmi SCJ in delivering the judgment of the court (in relation to sentence) said at p 210:

> In assessing sentence, we agree that custodial sentence is not necessary D in this particular case. On the other hand, we take into account the attitude of the advocate during the whole proceedings. As an officer of the court, he hs not disclosed any sign of regret or remorse for what he has done and the damage he has inflicted on the dignity and integrity of the court. Although the application by the Attorney General and the appellants is for an order of committal, having regard to all the factors and circumstances of this case, we impose a fine of RM5,000 in default E three months' imprisonment which in our view is fair and adequate. In imposing the sentence we also take into consideration that the commission of the offence is the first in point of time against the Supreme Court, and the publication of the contumelious letters is limited to the judicial fraternity. ...
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> F We also order that the advocate should pay the costs of this application both to the Attorney General and the appellants.

(5) In *Lakshminarayanan v Marimuthu* [1993] 1 MLJ 277, the High Court imposed a fine of RM2,000 on a party who was found guilty of contempt of court in disobeying an order of the court.

G (6) In *Wee Choo Keong v MBf Holdings Bhd & Anor* [1995] 3 MLJ 549, the appellant was found guilty by a majority decision of the Supreme Court, of evading the service of a court order. In the High Court, the appellant was sentenced to two years' imprisonment. On appeal, the Supreme Court set aside the custodial sentence and substituted it with a fine in the sum of RM7,000.

H In my considered view, the offence of the contempt of court is an interference with the administration of justice and the punishment to be meted out is not for the purpose of vindicating the dignity of the court, but to prevent the improper interference. The law of contempt of court is intended to ensure the effective administration of the law. 'The law of contempt of I court is a body of rules which exists as a means to vindicate the public interest in the due administration of justice', per Lord Simon in *A-G v Times Newspapers Ltd* [1974] AC 273 at p 315. 'It is not the dignity of the court which is offended ... it is the fundamental supremacy of the laws which is challenged', per Clyde LP in *Johnson v Grant* [1932] SC 789 at

p 790, cited with approval, inter alia, by Lord Edmund-Davies in *A-G v Leveller Magazine Ltd* [1979] AC 440 at p 459. A

Advocates and solicitors of our High Court are given clear and undoubted recognition by our courts and our country. They are given exclusive audience in our courts of law and such monopoly belongs to the advocates and solicitors, for no other citizens are given such privilege. B Advocates and solicitors enjoy the privilege, for example, of being addressed as learned members of the Bar, which is again a distinction not shared by other members of our society generally. The benefits and privileges are multi-faceted. However, these benefits are not absolute, but are co-related to corresponding burden and obligations in the discharge of their professional duties. Hence, a high standard of professional quality is C reasonably expected of our learned members of the Bar. As officers of the courts, an advocate and solicitor is least expected to interfere with, for example, a consent order which incorporates an undertaking given to the court. An advocate and solicitor who falls short of this professional standard, by contravening the consent order, or for that matter any order of the D court, does so at his own peril, for which the visitation of a sentence is inevitable.

In the light of the latest judicial thinking of the Supreme Court in *Wee Choo Keong v MBf Holdings Bhd* [1995] 3 MLJ 549, I impose a fine of RM7,000 or two months' imprisonment in default of payment thereof, as E a fair and reasonable sentence.

Fine imposed.

Reported by T Vimalavathy

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